Supreme Court, U.S.
FILED
DEC 7 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1069

MICHAEL-DAVID JOSE WEIL and
STEPHEN EUGENE LOOPER,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MELVIN L. WULF
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

FRANK E. G. WEIL
329 I Street, S.W.
Washington, D. C. 20024

Attorneys for Petitioners

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	5
1. The background	5
2. The facts of the search and seizure	7
Reasons for Granting the Writ	11
1. The search was not a border search	13
2. The search was unreasonable	14
Conclusion	16
Appendix	
Docket Entry of United States District Court, District of Arizona, dated December 1, 1969	1a
Opinion of the United States Court of Appeals for the Ninth Circuit	2a
Indictment	9a

TABLE OF AUTHORITIES

	Page
Cases:	
Beck v. Ohio, 379 U.S. 89 (1964)	16
Carroll v. United States, 267 U.S. 132 (1925)	12
Henry v. United States, 361 U.S. 98 (1959)	15, 16
Montoya v. United States, 392 F.2d 731 (5th Cir. 1968)	14
Murgia v. United States, 285 F.2d 14 (9th Cir. 1960)	15
Plazola v. United States, 291 F.2d 36 (9th Cir. 1961)	14
United States v. Glazion, 402 F.2d 8 (1968)	13
United States v. Kandlis, et al., —— F.2d —— (No. 24,775, decided May 28, 1970) (9 Cir. 1970)	7, 14
Constitutional Provision:	
United States Constitution Fourth Amendment	12, 13, 14, 16
Statutes:	
18 U.S.C. §545	3, 5
19 U.S.C. §482	2, 11
21 U.S.C. §176(a)	4, 5
28 U.S.C. §1254(1)	2
Other Authority:	
U. S. Department of the Interior, National Parks Service, *Public Use of the National Parks August 1969*, p. 6	10

In the

Supreme Court of the United States

October Term, 1970

No. .....

Michael David Jose Weil, a/k/a Michael Gibson and Stephen Eugene George a/k/a Stephen Lyme,

Petitioners,

—v.—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered October 8, 1970.

Opinion Below

The District Court did not write a formal opinion. The docket entry granting the motion to suppress the evidence is set out in the Appendix, *infra*, p. 1a. The opinion of the Court of Appeals is unreported and is set out in the Appendix, *infra*, p. 2a.

Jurisdiction

The opinion of the Court of Appeals was entered on October 8, 1970. On November 10, 1970, Mr. Justice Douglas granted an extension of time within which to file this petition for certiorari to and including December 6, 1970. The jurisdiction of this court rests on 28 U.S.C. Sec. 1254(1).

Question Presented

Whether in the circumstances of this case, the search and seizure conducted by customs agents, admittedly without probable cause, was a valid "border search?" If so, was the search reasonable.

Statutes Involved

19 U.S.C. §482

Search of vehicles and persons.

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle,

beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. (R. S. (3061.)

18 U.S.C. §545

Smuggling goods into the United States.

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise *after importation*, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be

recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States," as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam. (June 25, 1948, ch. 645, 62 Stat. 716; Aug. 24, 1954, ch. 880, §1, 68 Stat. 782; Sept. 1, 1954, ch. 1213, title V, §507, 68 Stat. 1141; June 30, 1955, ch. 258, §2(c), 69 Stat. 242.)

21 U.S.C. §176(a)

Smuggling of marihuana; penalties; evidence; definition of marihuana.

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty

years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. (Feb. 9, 1909, ch. 100, §2 (h), as added July 18, 1956, ch. 629, title I, §106, 70 Stat. 570.)

Statement of the Case

1. The background.[1]

Petitioners were indicted on September 9, 1960, on two counts, one for violation of 21 U.S.C. §174a in that they knowingly received, concealed and facilitated the transportation and concealment of approximately eleven and one-half pounds of marijuana after it had been imported and brought into the United States contrary to law, and the second count for violation of 18 U.S.C. §545 in that they knowingly imported and brought merchandise [approximately fifty-seven Ritalin tablets and approximately

[1] Except for inconsequential editorial changes, this portion of the Statement of the Case is taken verbatim from the brief of the government in the Court of Appeals below, pp. 3-5.

forty four (seven tablets (Appendix, *infra*, pp. 10a-11a)] into the United States contrary to law.[2]

On September 6, 1969, a preliminary hearing was held before the United States Commissioner in Tucson, Arizona.[3]

On September 29, 1969, petitioners' attorneys filed a motion to suppress the marijuana and other merchandise on the ground it was unlawfully seized. On October 2, 1969, the government filed a memorandum in opposition to petitioners' motion to suppress.

Petitioners were arraigned on October 30, 1969, at which time a hearing on petitioners' motion to suppress was held. The government offered as Exhibit 1 in evidence the Reporter's Transcript of the Preliminary Hearing, in response to defendants' motion to suppress, in lieu of a formal hearing on the motion. Exhibit 1 was admitted in evidence. On this same date, October 30, 1969, petitioners moved for ten days within which to file a memorandum in reply to the government memorandum in opposition to their motion to suppress. That memorandum was filed on November 19, 1969.

On December 2, 1969, the government filed its memorandum responding to the petitioners' contentions regarding the use of the Preliminary Hearing transcript and noticed the petitioners' motion to suppress evidence and the various memoranda concerning that motion for hearing on December 8th. The Court, however, had already ruled on petitioners' motion by minute entry on December 1, 1969, in the following language:

---

[2] The indictment is set out in the Appendix, *infra*, p. 10a.

[3] The record of that hearing is part of the record in this case. References to it are designated by the symbol Tr.

"It is ordered . . . that defendants' motion to suppress the fruits of the search and seizure made in this case is granted for the reason that the search was not made upon probable cause but upon mere suspicion; and in light of the facts and circumstances shown by the evidence, the search was not a 'border search'."

2. The facts of the search and seizure.[1]

The evidence suppressed is certain marihuana concentrate and certain drugs that were found in suitcases in the trunk of a car driven by petitioner Looper in which petitioner Weil was a passenger. The search occurred on Arizona State Highway 85, two and one-half miles north of Lukeville, Arizona.

We have recently had occasion to consider another case involving a car that crossed the border at Lukeville. *United States* v. *Kandlis, et al.*, 9 Cir. 1970, —— F.2d —— (No. 24,775, decided May 28, 1970). We there described in some detail the town of Lukeville, the surrounding area, the roads, the border and other features of the area [as follows:]

> Lukeville, Arizona is a tiny town on the Arizona-Mexico border next to the Organ Pipe Cactus National Monument, where state highway No. 85, coming from the north, reaches the border. The nearest town to the north of any size is Ajo, some forty miles away. The nearest Mexican town is Sonoita, two and one-half miles to the south. From there the road

[1] This portion of the Statement of the Case is taken verbatim from the opinion of the Court below, App., *infra*, pp. 2a-8a. It is supplemented by a number of facts, each of which is supported by appropriate references.

runs south and west to Puerto Penasco (also referred to as Rocky Point) on the Gulf of California, 65 miles away. Puerto Penasco is a fishing resort. On weekends a considerable number of vehicles cross the border en route to or from Puerto Penasco. Sonoita is reported to have a population of 5,000, but the only business there that might attract American students is said to be a house of prostitution. There is a secondary road east from Sonoita to the main highway south and thence to such resorts as Guaymas and Mazatlan.

The permanent population of Lukeville is about 50. On winter or spring weekends, such as March 2, 1969, there are enough trailer campers in the town to more than double the population. There is one commercial building containing, among other things, a bar, and one gasoline service station. Some 60 feet from the border, and across the highway from the commercial building, is the United States border station. On March 2, 1969, there were two United States Customs inspectors and three Immigration inspectors, but no other law enforcement personnel in Lukeville. There is an eight foot cyclone fence at the border, but to the West it extends only a quarter of a mile. From thence West, there is a four strand barbed wire fence. The gate across the highway is locked at midnight.

Six miles to the north, and just off highway 85, is the headquarters of the [Organ Pipe Cactus] National Monument . . . From the highway to the campgrounds is about a mile and a half. There are many roads in and out, and they are never closed. Especially on weekends, a certain amount of evening "partying"—

drinking beer and singing—goes on in the campgrounds. Hitchhikers are not uncommon along highway 85 (Slip Opinion, pp. 2-3).

Highway 85 is the only road north from Lukeville. About one mile north from the border, a graded road called Puerto Blanco Drive takes off from Highway 85. It runs west, more or less along the border—at some places as close to it as 20 feet. It does not lead to another town. After about 13 miles, it forks, the left fork continuing westerly to the boundary line of a federal game reserve, the right fork looping around to the north and going ultimately to the headquarters of Organ Pipe Cactus National Monument, a distance of about 51 miles. The Park Service recommends half a day for this scenic loop trip.

The events leading up to the search and seizure were these. At about 1:00 P.M. on August 19, 1969, Looper drove a Plymouth car into the United States from Mexico at Lukeville. Customs Agent Corley found in the trunk one small suitcase and a knapsack, but no contraband. There was a motel key for a motel in Sonora. Looper had a Virginia driver's license in the name of Lyme. The car had been rented at Tucson at 8:00 P.M. on August 18, also in the name of Lyme, but by the use of another person's credit card. Looper said the credit card belonged to a friend in New Jersey. Looper was vague about what he was doing in the area; he said that he was a photographer, but had no photographic equipment with him. The temperature was 108°, and there were very few sightseers in the area. Corley knew that a *modus operandi* of narcotic smugglers was to "fly from distant points to Tucson,

Phoenix;[5] rent a car, drive to Mexico, drive around the area. Later they will make contact, pick up the stuff."

[During the month of August, 1969, more than 23,000 visitors entered or passed through Organ Pipe Cactus National Park and more than 500 had stayed overnight. From January through August, 1969, 241,700 visitors were counted at the National Monument. U. S. Department of the Interior, National Parks Service, *Public Use of the National Parks August 1969*, p. 6.][6]

At about 6:10 P.M. on the same day, Corley was at home, some five and one-half miles north of the border, and received a radio message that the Plymouth car had again crossed the border from Mexico. He drove south on Highway 85, but did not see the car. At the border, he was told by Immigration Inspector Walker that the car had crossed with one occupant, the driver, a tall Caucasian person, and that it contained two small pieces of luggage. Corley then drove to the area of Puerto Blanco Drive and waited. In a short time, at about 7:00 P.M., he saw the Plymouth come out of Puerto Blanco Drive and turn north on Highway 85. [There was no surveillance of the automobile between the time it crossed the border and the time Corley saw it come

---

[5] There is testimony that Looper was in possession of a round trip airline ticket from Washington, D.C. to Tucson and return, purchased at Washington on August 18. However, it is not clear that this was discovered before the search and arrest, and we therefore do not rely on it. [Footnote by the court.]

It is in fact clear that the Customs agents had no knowledge of the airline ticket at this time. See Tr. 13. If Corley did not know at that time that Looper had flown in from Washington the previous day, his entire *modus operandi* justification of course evaporates into thin air.

[6] Though this information is not contained in the record, the Court may take judicial notice of the official government publication in which it appears.

out of Puerto Blanco Drive (Tr. 32-33).] There were two people in the vehicle. Corley followed it; he also asked, by radio to have Park Ranger Begeman come to his assistance, which Begeman did. Corley stopped the Plymouth about a mile and a half north of Puerto Blanco Drive. He did so because he "felt that they had picked up something on Puerto Blanco Drive and one person had illegally entered the United States." He asked both persons for identification, which they showed him. He also asked the passenger (Weil) where and when he entered the United States, but got no answer. He asked them to open the car trunk, which was done. He detected a strong odor of marihuana. The trunk contained the two small pieces of luggage that Corley had seen before, and two large tan leather suitcases. A search of those suitcases by Corley and Begeman revealed the contraband concealed beneath false bottoms.

On these facts the Court of Appeals reversed the District Court on the ground that the search was a "border search" and the customs agents therefore had the power to conduct the search without probable cause.

Reasons for Granting the Writ

Certiorari should be granted in this case because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, and because the decision below conflicts with the decision of another court of appeals on the same matter. Indeed, the decision below also conflicts with other decisions by the same court, which fairly demonstrates the general uncertainty surrounding the question of "border searches."

Section 482 of Title 19, United States Code, *supra*, pp. 2-3, is the source of the ostensible power exercised by the cus-

toms agents in this case. It authorizes customs agents to stop and search any vehicle or person wherever found, if there is reasonable cause to *suspect* that merchandise will be found which was imported contrary to law. The court below properly described the judicial gloss that has been put upon this statute:

> In order to avoid conflict between this statute and the Fourth Amendment, the statutory language has been restricted by the courts to "border searches." We must remember, however, that the phrase "border search" does not appear in either the statute or the Constitution. It is merely the courts' shorthand way of defining the limitation that the Fourth Amendment imposes upon the right of customs agents to search without probable cause. App., *infra*, p. 7a.

This Court seems never to have considered directly the "border search" exception to the Fourth Amendment. Dictum in *Carroll* v. *United States*, 267 U.S. 132, 154 (1925), speaks of the validity of searches without probable cause *on* the border but makes no reference to customs searches without probable cause subsequent to entry into the United States. Insofar as *Carroll* says anything about such searches, it can be read to disapprove them, for immediately after referring to searches *on* the border, the Court said, "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, *probable cause for believing* that their vehicles are carrying contraband or illegal merchandise." *Ibid.* (emphasis added).

The case at bar involves the validity only of customs searches after entry. It does not raise the broader question of searches *on* the border itself at the time of entry.

The question in this case, then, is twofold: first, whether the search was a "border search." If not, then the search was illegal because not made upon probable cause within the meaning of the Fourth Amendment. But even if the search is held to be a "border search," the question remains whether the search was "reasonable," for as the Second Circuit said in *United States* v. *Glaziou*, 402 F.2d 8, 12 (1968), " . . . border stops and searches, like all stops and searches by public officials, are restricted by the requirement that they be reasonable . . . but what is reasonable, of course, will depend on all the facts of a particular case."

1. The search was not a border search.

Petitioner Looper entered the United States for the second time on August 19th at about 6 P.M. His car had been searched both times at the border and no contraband found either time. About an hour after entry, the car was seen to emerge from Puerto Blanco Drive, the entrance to the National Monument, about a mile north of the border. The customs agent followed the car for about a mile and a half further north of Puerto Blanco Drive, then stopped the car and conducted the search. There was no surveillance of the car in the hour which passed after entry into the United States.

The court below acknowledges that its own earlier decisions support the District Court's conclusion that, on these facts, the search was not a "border search" because there was not continuous surveillance to make it reason-

ably clear that whatever was in the car when it was searched was also in it when it crossed the border (App., *infra*, pp. 5a-6a). Furthermore, it adopts a new rule in this case which bends the definition of a "border search" past its breaking point, for now it holds that a *vehicle* may be searched without probable cause, and presumably "wherever found," if customs agents "are reasonably certain that parcels have been smuggled across the border and placed in a vehicle, whether the vehicle has itself crossed the border or not . . ." (App., *infra*, p. 7a).

In addition, the court below has departed from the rule in its own recent decision in *United States* v. *Kandlis*, *supra*, where it held that, on facts not dissimilar to the ones in the case at bar, that a search was not a "border search" and therefore in violation of the Fourth Amendment. See also *Plazola* v. *United States*, 291 F.2d 56 (9th Cir. 1961); *Montoya* v. *United States*, 392 F.2d 731 (5th Cir. 1968) (customs search at downtown Miami hotel one hour after arrival of passengers on international flight held not a "border search").

2. The search was unreasonable.

Even if the search were a "border search," the customs agents did not have sufficient reason even to *suspect* that contraband was in the automobile. All that the customs agent knew at the time he stopped petitioners in the automobile north of Puerto Blanco Drive was that petitioner Looper, in a rented automobile, had crossed the border twice in a single day, that the automobile had been searched each time without finding any contraband, that Looper was from Virginia, that he was vague about what he was doing

in the area, that he had driven down a road leading to a National Monument which was a well-attended tourist attraction, and that he emerged from the same road with a passenger. What the customs agent *did not know* at that time, and what he did not find out until *after* the search, was that Looper had a round trip airline ticket from Washington, D. C. to Tucson, and that there was a strong odor of marijuana coming from the car trunk. Consequently, customs agent Corley could not have applied to Looper, prior to the search, his knowledge that "a *modus operandi* of narcotic smugglers was to 'fly from distant points to Tucson, Phoenix, rent a car, drive to Mexico, drive around the area.'"

Whatever the agent knew about petitioners before the search was compatible with innocence, for not even in "border searches" can an arrest "be justified by what a later search discloses." *Murgia* v. *United States*, 285 F.2d 14, 18 (9th Cir. 1960); see also *Henry* v. *United States*, 361 U.S. 98, 104 (1959). For all the customs agent knew, in the hour which elapsed between the time Looper crossed the border and the time his car was stopped, he might have driven up Route 85 ten or twenty miles (beyond where agent Corley lived), picked up Weil anywhere along the way where his car might have broken down or where he was hitchhiking, and then returned to explore the National Monument; or Looper might have been exploring the National Monument himself and run across Weil by his broken-down car on Puerto Blanco Drive. The government would have it in this case that anyone who flies into Tucson, rents a car, goes to Mexico, returns to the United States, and visits Organ Pipe Cactus National Park, is fair game for agent Corley—including

the 241,700 visitors who preceded petitioners into the National Monument in 1969.

There is obvious constitutional tension between the right to search upon entry into the country and the dictates of the Fourth Amendment which control searches within the nation's borders, for surely there is no question that, apart from the entry across the border, the identical fact pattern could not support a valid search. See *Beck v. Ohio*, 379 U.S. 89 (1964); *Henry v. United States*, 361 U.S. 98 (1959). Certiorari should therefore be granted to decide whether the search in this case is reasonable within the meaning of the Fourth Amendment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Melvin L. Wulf
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, N. Y. 10010

Frank E. G. Weil
329 I Street, S.W.
Washington, D. C. 20024

Attorneys for Petitioners

December 7, 1970

APPENDIX

APPENDIX

Docket Entry of United States District Court, District of Arizona, dated December 1, 1969

MINUTE ENTRY: It is ordered that defendants' motion to dismiss the indictment is denied and seizure made in this case is granted for the reason that the search was not made upon probable cause but upon mere suspicion; and in light of the facts and circumstances shown by the evidence, the search was not a "border search."

Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 25,594

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—v.—

MICHAEL DAVID JOSE WEIL, aka MICHAEL JAMES GIDEON, and STEPHEN EUGENE LOOPER, aka STEPHEN LYME,

Defendants-Appellees.

[October 8, 1970]

Appeal from the United States District Court for the District of Arizona

Before: DUNIWAY and CARTER, Circuit Judges, SWEIGERT, District Judge*

DUNIWAY, Circuit Judge:

The United States appeals, under 18 U.S.C. § 3731, as amended by Pub.L. 90-351 of June 19, 1968, 82 Stat. 197,

* Honorable William T. Sweigert, United States District Judge, Northern District of California, sitting by designation.

237 38, from an order granting a motion to suppress evidence. The United States Attorney has certified that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of the charge pending against the appellees (defendants). We reverse.

The evidence suppressed is certain marihuana concentrate and certain drugs that were found in suitcases inothe trunk of a car driven by appellee Looper and in which appellee Weil was a passenger. The search occurred on Arizona State Highway 85, two and one-half miles north of Lukeville, Arizona.

We have recently had occasion to consider another case involving a car that crossed the border at Lukeville.- *United States* v. *Kandlis*, et al., 9 Cir., 1970, ... F.2d ....., (No. 24,775, decided May 28, 1970). We there described in some detail the town of Lukeville, the surrounding area, the roads, the border and other features of the area. We do not repeat that description here, but we add a little to it. Highway 85 is the only road north from Lukeville. About one mile north from the border, a graded road called Puerto Blanco Drive takes off from Highway 85. It runs west, more or less along the border—at some places as close to it as 20 feet. It does not lead to another town. After about 13 miles, it forks, the left fork continuing westerly to the boundary line of a federal game reserve, the right fork looping around to the north and going ultimately to the headquarters of Organ Pipe Cactus National Monument, a distance of about 51 miles. The Park Service recommends half a day for this scenic loop trip.

The events leading up to the search and seizure were these. At about 1:00 P.M. on August 19, 1969, Looper drove a Plymouth car into the United States from Mexico at

Lakeville. Customs Agent Corley found in the trunk one small suitcase and a knapsack, but no contraband. There was a motel key for a motel in Sonora. Looper had a Virginia driver's license in the name of Lyme. The car had been rented at Tucson at 8:00 P.M. on August 18, also in the name of Lyme, but by the use of another person's credit card. Looper said the credit card belonged to a friend in New Jersey. Looper was vague about what he was doing in the area; he said that he was a photographer, but had no photographic equipment with him. The temperature was 108°, and there were very few sightseers in the area. Corley knew that a *modus operandi* of narcotic smugglers was to "fly from distant points to Tucson, Phoenix;[1] rent a car, drive to Mexico, drive around the area. Later they will make contact, pick up the stuff."

At about 6:10 P.M. on the same day, Corley was at home, some five and one-half miles north of the border, and received a radio message that the Plymouth car had again crossed the border from Mexico. He drove south on Highway 85, but did not see the car. At the border, he was told by Immigration Inspector Walker that the car had crossed with one occupant, the driver, a tall Caucasian person, and that it contained two small pieces of luggage. Corley then drove to the area of Puerto Blanco Drive and waited. In a short time, at about 7:00 P.M., he saw the Plymouth come out of Puerto Blanco Drive and turn north on Highway 85. There were two people in the vehicle. Corley followed it; he also asked, by radio to have Park Ranger Begeman come

---

[1] There is testimony that Looper was in possession of a round trip airline ticket from Washington, D.C. to Tucson and return, purchased at Washington on August 18. However, it is not clear that this was discovered before the search and arrest, and we therefore do not rely on it.

to his assistance, which Begeman did. Corley stopped the Plymouth about a mile and a half north of Puerto Blanco Drive. He did so because he "felt that they had picked up something on Puerto Blanco Drive and one person had illegally entered the United States." He asked both persons for identification, which they showed him. He also asked the passenger (Weil) where and when he entered the United States, but got no answer. He asked them to open the car trunk, which was done. He detected a strong odor of marihuana. The trunk contained the two small pieces of luggage that Corley had seen before, and two large tan leather suitcases. A search of those suitcases by Corley and Begeman revealed the contraband concealed beneath false bottoms.

In *Kandlis, supra*, the government made no claim that the search there involved was a border search; it relied upon a claim that there was probable cause for the arrest and search. We held that, under the facts that there appeared, there was not probable cause. In the present case, the government disclaims reliance upon probable cause; it claims that the search was a "border search," so that probable cause was not required.

If we take the term "border search" literally, this was not a border search. It did not occur at the border, and the car had already been searched there. Moreover, when the car crossed the border, it contained no contraband. We assume that it was because of these facts that the trial judge held that the search was not a border search and granted the motion to suppress. There is no doubt that the language of some of our decisions supports this result. For example, in cases in which we have upheld a search as a border search, we have emphasized that under the facts it was reasonably clear, by reason of continuous surveil-

lance, that whatever was in the car when it was searched was also in it when it crossed the border. See, *e.g.*, *King* v. *United States*, 9 Cir. 1965, 348 F.2d 814; *Lacks* v. *United States*, 9 Cir. 1966, 356 F.2d 470; *Alexander* v. *United States*, 9 Cir., 1966, 362 F.2d 379; *Rodriguez-Gonzalez* v. *United States*, 9 Cir., 1967, 378 F.2d 256; *Bloomer* v. *United States*, 9 Cir., 1969, 409 F.2d 869; *Castillo-Garcia* v. *United States*, 9 Cir., 1969, 424 F.2d 482. Yet even in such cases, we have not required certainty. Thus in *Alexander*, *supra*, and *Castillo-Garcia*, *supra*, there had been a break in the surveillance, but the search was upheld, because it appeared, "with reasonable certainty," (362 F.2d at 382) that the contraband had been in the vehicle when it crossed the border. The language of the opinions in these cases must be considered in the light of the facts to which it relates. In each case, the government claimed that the facts showed that the contraband had been in the vehicle when it crossed the border; in each, that contention was upheld. It does not follow, in spite of rather restrictive language in some of the opinions, that such a showing is the *sine qua non* of a "border search."

It is provided in 19 U.S.C. § 482:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, * * * or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or * * * otherwise, . . ."

In order to avoid conflict between this statute and the Fourth Amendment, the statutory language has been restricted by the courts to "border searches." We must remember, however, that the phrase "border search" does not appear in either the statute or the Constitution. It is merely the courts' shorthand way of defining the limitation that the Fourth Amendment imposes upon the right of customs agents to search without probable cause. The latter right is predicated on the right and obligation of the government, which predate the founding of the Republic, to prevent the importation of contraband or of undeclared, and therefore untaxed, merchandise, and on the universal understanding that persons, parcels and vehicles crossing the border may be searched. See Judge Waterman's discussion of the phrase in *United States* v. *Glazion*, 2 Cir., 1968, 402 F.2d 8, 12-14.

It seems obvious to us that the right of customs agents to search a vehicle without probable cause is not confined to vehicles that have crossed the border. For example, if customs agents see a vehicle cross the border, and see the occupant then transfer parcels from that vehicle to another that has not crossed the border, the agents surely have a right to search the latter vehicle. We also think that, if customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle. Similarly, if the agents are reasonably certain that a person has crossed the border illegally, and has then entered a vehicle on this side of the border, we think that they may stop and search the vehicle and person. They can assume that he may have brought something with him.

Further than that we need not go in this case. Its facts are different from those in *Kandlis, supra.* Here, the events occurred in summer, when there were few sightseers in the area. Here, there were highly suspicious circumstances when Looper first crossed the border. Here, the elapsed time was much shorter than in *Kandlis,* thus eliminating the possibility that Looper had picked Weil up anywhere but on Puerto Blanco Drive. It would tax credulity to believe that he was, on that hot day, sightseeing on Puerto Blanco Drive while carrying two large suitcases. Here, while there was not a complete surveillance, and while Weil was not seen crossing the border with the suitcases, the surveillance was such as to make it reasonably certain that that is what he did. As applied to the facts of this case, we agree with what Judge Chambers said in his dissent in *Kandlis, supra;* the chances that this is what Weil did are at least 99 in 100, and that is certainly enough.

No case has come to our attention that presents substantially similar facts. But there are cases in which "border searches" were upheld where the person or vehicle searched had not been seen to cross the border. See, *e.g., United States* v. *Glaziou, supra; United States* v. *McGlone,* 4 Cir., 1968, 394 F.2d 75, 77-78. Some of our own decisions involve a driver who had not crossed the border, but who had taken over a vehicle that had crossed. See, *e.g., Rodriguez-Gonzalez* v. *United States, supra; Alexander* v. *United States, supra; Lannom* v. *United States,* 9 Cir., 1967, 381 F.2d 858.

The order appealed from is reversed and the case is remanded for further proceedings.

Indictment

RICHARD K. BURKE
United States Attorney
Post Office Box 1951
Tucson, Arizona 85702
Telephone: 792-6323

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. CR-69-307 Tucson

Violations: 21 U.S.C. 176a
18 U.S.C. 545

(Receive, Conceal & Facilitate Transportation & Concealment of Marihuana; Import Contrary to Law)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL DAVID JOSE WEIL, also known as MICHAEL JAMES GIDEON, and STEPHEN EUGENE LOOPER, also known as STEPHEN LYME,

Defendants.

THE GRAND JURY CHARGES:

COUNT I

21 USC 176a

On or about the 19th day of August, 1969, within the District of Arizona, MICHAEL DAVID JOSE WEIL, also known as MICHAEL JAMES GIDEON, and STEPHEN EUGENE LOOPER, also known as STEPHEN LYME, did knowingly receive, conceal, and facilitate the transportation and concealment of approximately eleven and one-half (11½) pounds of marihuana concentrate, on State Highway 85 approximately two and one-half miles north of Lukeville, Arizona, after the same had been imported and brought into the United States of America contrary to law, and when said MICHAEL DAVID JOSE WEIL, also known as MICHAEL JAMES GIDEON, and STEPHEN EUGENE LOOPER, also known as STEPHEN LYME, knew the same had been imported and brought into the United States of America contrary to law, that is to say, without being declared and presented for inspection to a United States Customs Officer at the port of entry; in violation of 21 U.S.C. §176a.

COUNT II

18 USC 545

On or about the 19th day of August, 1969, within the District of Arizona, MICHAEL DAVID JOSE WEIL, also known as MICHAEL JAMES GIDEON, and STEPHEN EUGENE LOOPER, also known as STEPHEN LYME, did knowingly and with intent to defraud the United States of America, import and bring into the United States of America, at Lukeville, Arizona, approximately fifty-seven (57) Ritalin tablets and

approximately forty-four (44) Darvon tablets, contrary to law, that is to say, without being presented and declared for inspection to a United States Customs Officer at the port of entry, in violation of 18 U.S.C. §545.

A True Bill.

S. C. Reusser
Foreman

Richard K. Burke
United States Attorney

Ann Bowen
Assistant United States Attorney

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1069

MICHAEL-DAVID JOSE WEIL and
STEPHEN EUGENE LOOPER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were indicted in the United States District Court for the District of Arizona on two counts charging the smuggling of marijuana and other drugs, in violation of 21 U.S.C. 176a and 18 U.S.C. 545. The district court granted petitioners' pre-trial motion to suppress, finding that the search in which the drugs were discovered was not based upon probable cause and that it was not a valid border search.

On the appeal of the United States pursuant to 18 U.S.C. 3731, the court of appeals reversed (Pet. 2a-8a).

The pertinent facts, which are detailed in the opinion below, show that at about 1:00 p.m. on August 19, 1969, petitioner Looper was the sole occupant of an automobile entering the United States from Mexico at the border town of Lukeville, Arizona. Although a search of the trunk of the automobile revealed no contraband at the time of entry, petitioner's responses to certain questions aroused the suspicion of Customs agent Corley. At about 6:10 p.m. that same day, Corley was advised that the same automobile, with Looper still the sole occupant, had again crossed the border from Mexico, with no contraband found. Corley thereupon drove to a nearby road fairly close to the border; at about 7 p.m. he saw the automobile —this time with another occupant (later identified as petitioner Weil) in addition to petitioner. The agent stopped the car because he "felt that they had picked up something on [the road] and one person had illegally entered the United States" (Pet. 5a). The agent received no response when he asked Weil where and when he had entered the United States. A search of the trunk disclosed additional suitcases not seen there before which contained marihuana and other contraband drugs.

Petitioner contends that, in the absence of a finding of probable cause below, the search of the automobile violated the Fourth Amendment (1) because it was not properly a "border search" within the proper meaning of 19 U.S.C. 482, which permits

such searches on suspicion of contraband (see Pet. 6a-7a) and (2) because in any event the Customs agent had no reason to suspect that the vehicle contained contraband. These contentions are without substance; the circumstances that the court of appeals' opinion describes in some detail plainly support its conclusion that the agent had grounds for suspicion that Weil had come across the border in the isolated area from which the car was seen emerging, and that he had brought something with him; when petitioners opened the car's trunk upon request, it became "reasonably certain" that the two additional suitcases found there had come with him (Pet. 8a). The rule suggested by petitioners as to the need for continuous surveillance has not been adopted by any circuit and was properly rejected below. See, *e.g.*, *Walker* v. *United States*, 404 F.2d 900, 901 (C.A. 5). In this case the proximity to an isolated border area, together with all the suspicious circumstances, justified treating this search as a border search under 19 U.S.C. 482.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 412986 430